United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1163

75-1150

ORIGINAL

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

against

MICHAEL DURST, SUSAN WEINBLATT, STEPHEN EFFRON, STANLEY NICASTRO, JOHN PERLMAN, JEFFREY PREISMAN, JANE DOE, a/k/a "Sam",

Defendants,

and

STUART STEINBERG, HOWARD KAYE, JAMES PARKER, WILLIAM CAPO,

Defendants-Appellants.

Appeal from a Judgment of the United States District Court for the Southern District of New York

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BRIEF FOR THE DEFENDANT-APPELLANT HOWARD KAYE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

Statutes* and *Other Authorities:

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Statement

Howard Kaye appeals from a judgment of the United States District Court for the Southern District of New York rendered by Judge Robert J. Ward on March 18, 1975. The decision is not reported.

Kaye was convicted, pursuant to Title 21, United States Code, Section 846, of a conspiracy to distribute and to possess with intent to distribute various controlled substances and, pursuant to Title 21, United States Code, Section 843(b), with using a communication facility in causing and facilitating the commission of the conspiracy.

Kaye received a sentence of two months, to be followed by three years of special parole, and fined $5,000 on each count; the fine and sentence on each count are to be concurrent.

Questions Presented

1. Whether Howard Kaye, by telling Stuart Steinberg that he was able to assist Steinberg in purchasing drugs from a third party, became a member of a conspiracy.

2. Whether the Government proved multiple conspiracies at the trial as opposed to the single conspiracy alleged in the indictment.

3. Whether proof of the multiple conspiracies was prejudicial to Howard Kaye whose alleged participation in the drug scheme ended long before the other separate conspiracies began.

Statement of the Case

In a fourteen-count indictment filed in the United States District Court for the Southern District of New York (73 Cr. 1095; JA 5*) the defendant-appellant, Howard Kaye, and ten other persons—Stuart Steinberg, William Capo, Michael Durst, James Parker, Susan Weinblatt, Stephen

* References preceded by "JA" are to the pages of the Joint Appendix filed by the Appellants Steinberg and Kaye. References preceded by "Tr." are to the pages of the transcript of the trial.

Effron, Stanley Nicastro, Sara-Suzanna Werman (also called "Sam"), John Perlman and Jeffrey Preisman—were charged with a conspiracy to violate the federal narcotics laws and various substantive counts. The conspiracy count charged that the eleven named defendants conspired to violate 21 U.S.C. §§812, 841(a)(1) and 841(b)(1)(B). It was alleged to be part of the conspiracy that the defendants would distribute and would possess with intent to distribute various Schedule I, Schedule II and Schedule III drugs. Three counts charged various defendants other than Kaye with distributing and possessing with intent to distribute quantities of a Schedule III controlled substance, phencyclidine hydrochloride (PCP). The remaining counts charged that various defendants violated 21 U.S.C. §843(b) by using a telephone in the commission of the conspiracy. Howard Kaye was charged solely in the conspiracy count and count seven, one of the "wire" counts.

After protracted pre-trial proceedings, the trial commenced before Judge Ward and a jury on January 20, 1975. At trial, the only remaining defendants, after severances and guilty pleas, were Stuart Steinberg, James Parker, William Capo and the defendant-appellant Howard Kaye.

The Government's proof at trial consisted of testimony that small quantities of drugs were purchased from Steinberg by undercover agents and tape recordings obtained from wiretaps placed on Steinberg's two telephones.

Special Agent Brian Noone of the Drug Enforcement Administration (DEA) testified that on June 26, 1973 he was introduced to Stuart Steinberg by an informant and

received a quantity of phencyclidine hydrochloride (PCP) (Ex. 4B) as a sample since he was posing as a large scale buyer of PCP (Tr. 56-62). On June 27th, he purchased two ounces of PCP (Ex. 5C) for $2,400 (Tr. 63-77). Agent Noone met with Steinberg again on July 10, 1973. He stated that he wanted to buy twenty pounds of PCP and requested one-half pound as a sample. Agent Noone returned to the apartment later on the 10th together with DEA Special Agent Arthur Anderson, who was posing as the "money man" behind Noone, and, after some negotiations, purchased eight ounces of PCP (Ex. 7C) for $8,800 (Tr. 73-80).

Agent Noone also testified that he had various telephone conversations with Steinberg concerning the remainder of the twenty pound purchase and a possible fifty pound PCP purchase. The transaction was scheduled to take place on July 26th in Steinberg's apartment with Noone to pay $850 an ounce or $680,000. Noone also remarked that "Artie," as Agent Anderson was known, "Wanted me to ask Steinberg if he had any sources of cocaine". Steinberg said he would look into it.

The remainder of the Government's proof consisted of testimony by a chemist who analyzed the purchased drugs, and the technical foundations for the playing of certain selected wiretap conversations which had been recorded over thirty days beginning July 20th and ending August 30.*

* The tapes (Exs. 3C and 3D) were played for the jury. Transcripts, marked for identification, were used as a jury aid and were numbered to match the conversation. The exhibit number of each transcript identifies which of Steinberg's two telephones they were made on, contains a letter which was different for each day of the wiretapping and also contains a final number indicating which con-

(Only five of the sixty-eight conversations played involved Howard Kaye.)

The first conversations were between Steinberg and Noone and between Steinberg, a David Stolzenberg and Michael Durst. The substance of those conversations was that the PCP deal could not possibly be completed because one of the sources of the drugs had been arrested. After negotiations, Noone and Anderson agreed to buy fifty pounds of cocaine instead of PCP.

The first time there was any mention of Howard Kaye on the wiretaps is on July 25th (Ex. 1C4; JA 92-6). In that conversation, Kaye speaks with Stolzenberg and discusses a transaction involving "Rock" (cocaine) which Kaye was attempting to buy. Kaye agreed to speak with Stolzenberg the next day.

Steinberg continued his negotiations with the undercover agents with respect to the fifty pound cocaine transaction and had conversations with various people trying "to put together" the cocaine transaction. On July 26 (Ex. 1D1) Steinberg told James Parker that he had no drugs. "Both [sources] dried up. Not there. Both. Howard's supposed to be here today for two ounces and he can't have it. * * * It just isn't there to be gotten. Umh. I got people going all over the place looking for it."

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versation on that day was involved. Thus, Exhibit 1C4 is the conversation overheard on telephone one, on the third day of the wiretapping, and is the fourth conversation that day that was overheard. Since no issue was raised below as to the accuracy of the transcripts, they, and not the tapes, are referred to herein. Actually, the court orders were for 20 days and, after a gap of 11 days, were renewed for an additional 10 days.

Later Steinberg called Kaye at Kaye's office (Ex. 1D3; JA 97-9), and Kaye, apparently referring to the two ounces of cocaine he wanted to buy, stated "in other words you can't". Steinberg replied, "I told you I can't do it." Kaye wanted to speak to "Davy," apparently David Stolzenberg; Steinberg responded that Stolzenberg cannot "do it" either. At that point Steinberg mentioned to Kaye that he was "doing fifty pounds". Steinberg remarked: "It's gotta be the right thing." Kaye replied: "Well, I'll get it in California for you in fifteen minutes." "Howard, I don't care what it is. It has to be fifty pounds." Steinberg added that he could pay $680,000.

About one-half hour later, Steinberg called Kaye back impatiently (Ex. 1D4; JA 100-6). Kaye said "I got two people calling back who are calling back [*sic*] who can do it." They discussed the price that Steinberg's "people" were willing to pay and Kaye again noted "I could put it together in two minutes in Frisco, but then you'd—." During the remainder of the conversation, Kaye continuously reminded Steinberg of the dangers of dealing with large quantities of drugs.

Some time shortly after that, Steinberg called Stolzenberg and said: "I have Howard Kaye working on that thing with people on the coast" and that "I'll do it with you, I'll do it with Howard Kaye, I'll do it with anybody who can get it together" (Ex. 1D5). Later, Steinberg told Stolzenberg that he could buy several thousand seconals or tuinals (Ex. 1D7). Parker also called Sara-Suzanna Werman to discuss a quarter ounce of "hash oil" (Ex. 1D10).

The next day, after Steinberg and Stolzenberg had a lengthy conversation and discussed hashish oil and quaaludes* (Ex. 2E1), Steinberg called Kaye (Ex. 2E7; JA 107) and asked "What's happening"? Kaye replied, "Nothing. Nothing in the world * * * nothing I can't do that", and when Steinberg asked, "Anything for any amount for any quantity for anything", Kaye said no, I "can't do it".

On July 31, Steinberg and Kaye talked again (Ex. 2I8; JA 108-4), there being extensive discussions about Steinberg's prospective drug transactions, purchases of cocaine and "crystal". Towards the end of the conversation, Kaye emphatically told Steinberg, "I don't want nothing to do with it." Steinberg then tells Kaye, "If you can get me anything between now and September 1, you're in. I'll cut you in half with me." Kay responded, "No thank you."

Kaye was not overheard or mentioned in any of the further tapes, which consist primarily of conversations between Steinberg and the undercover agents, Steinberg and Stolzenberg and Steinberg and various of the other defendants. Thus, on a number of occasions Steinberg spoke to William Capo who, the wiretaps disclosed, was one of Steinberg's drug suppliers. At various times during the period covered by the indictment, Capo offered to sell Steinberg hashish, marijuana and certain unidentified pills; yet, in another instance, Capo sought to purchase cocaine from Steinberg (Exs. 1E2, 1N8, 1P7, 2J7, 2K1-3, 2K6-8, 2K11-12, 2O11).

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* At the time of the indictment, quaaludes were not a controlled substance and the jury were continually instructed that the conversations regarding them should be disregarded.

Steinberg also had dealings with certain other named defendants. On one occasion he discussed purchasing 5,000 tuinals and seconal pills, which Steinberg decided would be offered to the undercover officers, from defendant Preisman (Exs. 1I9-10, 1J1-2, 2J2). Steinberg also had a number of telephone discussions with Stephen Effron, who appears to have acted in the capacity of both seller and buyer; thus, at different times Effron offered to sell Steinberg ten pounds and three pounds of cocaine. While on another occasion Effron spoke about PCP and purchasing unnamed drugs (Exs. 2N11, 2P2; see also Ex. 1P5).

Additionally, the wiretaps disclosed certain conversations between the defendants Werman and Parker wherein it was apparently established that Parker had purchased one and one-half ounces of hashish oil and 200 quaaludes from Steinberg; these conversations also disclosed that the hashish oil had been furnished to Steinberg by defendant Capo (Exs. 1D10, 1P1, 1P6, 2D13).

The Government also proved that at the time Howard Kaye was arrested he told Agent Barrett, "That he knew Stuart Steinberg from NYU, that the only time he would probably talk to Steinberg would be like an insurance man, customer type relationship, and that was the only contact he would have with him." (Tr. 433; see also Tr. 435-6).

In Howard Kaye's defense, his father testified that Howard Kaye sold insurance to Steinberg and that Steinberg and Howard Kaye had been friends from their student days at NYU. Howard Kaye did not testify.

Kaye also called two psychiatrists who testified to his mental state at various times prior to and during the period covered by the Government's testimony. Both psychiatrists had treated Howard Kaye in the past.

Dr. Friend had treated Howard Kaye from 1963-1970. During that period Kaye was unable to function normally and occasionally used marijuana and cocaine. When given a choice of continuing psychoanalytic treatment or continuing his drug use, the drug use prevailed (Tr. 500-12). Dr. Willis testified that he treated Howard Kaye from December 1970 to March 1974. During that time Kaye experienced abnormal thought patterns and became paranoid. Also, his ability to function was extremely limited. During the period of treatment, Kaye used various drugs: amphetamines, cocaine, barbiturates, seconal, tuinol, quaaludes, sopors, marijuana, LSD, heroin and, perhaps, mescaline (Tr. 521-33).

Motions at the end of the Government's case to strike the hearsay testimony since no conspiracy existed and to dismiss for insufficiency (Tr. 456) were denied (Tr. 468). A motion for acquittal, pursuant to Rule 29 of the Federal Rules of Criminal Procedure was also denied (Tr. 685, 691). Kaye was convicted of the conspiracy count and one "wire" count as charged. On March 18th, Judge Ward, who noted Kaye's lack of a prior criminal record, his pre-trial psychiatric hospitalization and his family background, sentenced Kaye to serve two months in prison, pay a $5,000.00 fine and serve three years of special parole on each count; the sentences and the fine to be concurrent on each count. A stay of execution and bail pending appeal were granted.

On March 19th, the defendant-appellant requested that the stay of execution be vacated since, as counsel below noted, "After consulting with my client, my client's family and my client's psychiatrist, a decision has been made that it would be in the interests of Mr. Kaye to commence his sentence at the earliest possible date." The defendant surrendered at Allenwood on April 11, 1975; the fine was paid.

By the time this appeal is heard, Kaye will have completed serving his sentence.

POINT I

Since there was no proof that Howard Kaye had any stake in the distribution of narcotic drugs or made any affirmative attempt to further the enterprise, the evidence was insufficient to establish his membership in any conspiracy proved at the trial.

Howard Kaye is a young man, with a history of psychiatric difficulties (see *e.g.* Tr. 510-12, 521-33) who, as part of his illness, used cocaine; he was convicted of a federal drug conspiracy on the strength of five telephone conversations he had with his drug supplier. However, the evidence, viewed in the light most favorable to the Government, did not establish that Kaye was a member of any of the conspiracies alleged in the indictment. The indictment charged that the eleven named defendants conspired with each other to distribute and to possess with intent to distribute Schedule I, Schedule II and Schedule III controlled substances (JA 5), that is, they agreed to deal in hashish, cocaine, phencyclidine hydrochloride (PCP), se-

conal and tuinol. The theory of the prosecution was that Howard Kaye entered the conspiracy by agreeing to provide fifty pounds of cocaine or PCP for Stuart Steinberg to sell to undercover officers Noone and Anderson. As counsel for Kaye below argued at the end of the Government's case (Tr. 456-68) the proof was deficient since there was no evidence to show that Howard Kaye agreed to enter the conspiracy, had a stake in the outcome of the conspiracy or made any affirmative efforts to assist the conspirators in obtaining the objectives of the unlawful agreement alleged.

The guiding precepts may be simply stated. To establish one's membership in a conspiracy it must be shown that the actor has a "stake in the venture". "[H]e must in some sense promote their [the conspirators'] venture himself, make it his own, have a stake in its outcome." *United States* v. *Cianchetti,* 315 F.2d 584, 588 (2d Cir. 1963); see also *United States* v. *Johnson,* slip op. 2673, 2680 (2d Cir. Apr. 1, 1975); *United States* v. *Sisca,* 503 F.2d 1337 (2d Cir. 1974), *cert. denied,* 42 L.Ed.2d 283 (1974); *United States* v. *Hysohion,* 448 F.2d 343 (2d Cir. 1971). Additionally, it must be also shown that the alleged co-conspirator made an "affirmative attempt to further the purpose" of the criminal enterprise. *United States* v. *Johnson, supra.* Under these tests Kaye's actions did not make him a member of a criminal conspiracy.

The evidence established that the undercover agents purchased more than ten ounces of PCP as a first step toward their purchase of fifty pounds of that drug. As the wiretaps revealed, after Steinberg and his cohorts could not arrange such a transaction, the deal was switched

to a fifty-pound purchase of cocaine. While Steinberg made frenetic efforts to locate drugs for sale to the federal agents, Kaye was first overheard on the telephone as a prospective purchaser of two ounces of cocaine and was told that he can't have it (Ex. 1C4; JA 92-96). The next day, while Steinberg was reiterating that "I can't do" the sale of the two ounces to Kaye, he told Kaye that, "I'm doing fifty pounds", to which Kaye replied, "Well I'll get it in California for you in fifteen minutes." Steinberg added, "Howard, I don't care what it is. It has to be fifty pounds" for $680,000. Steinberg told Kaye to call him back in a half hour. (Ex. 1D3; JA 97-9). Apparently one-half hour later Steinberg called Kaye and was told that "I got two people calling back who are calling back [*sic*] who can do it." "I could put it together in two minutes in Frisco, but then you'd—". Kaye then described somewhat graphically for Steinberg the risks of dealing in large quantities of drugs—it might involve people "with machine guns". Steinberg explained that the deal was to be for cocaine or "crystal" (PCP). Kaye referred to "a Peruvian connection" and then noted additional problems in this type of deal. "I don't want to be killed." Steinberg reassured Kaye that the purchaser has money "in a safe deposit box" (Ex. 1D4; JA 100-6).

Later in the day, Steinberg told David Stolzenberg, a cohort of his, that "I'll do it with you, I'll do it with Howard Kaye, I'll do it with anybody who can get it together first." (Ex. 1D7). The next day, Steinberg called Kaye and Kaye told him, "nothing, I can't do that". Steinberg replied, "Anything for any amount for any quantity for anything." Kaye rejoined, "No * * * I can't

do it'' (Ex. 2E7; JA 107). Kaye reappeared on the wiretaps four days later. He called Steinberg and said, ''I wasn't making sense'' a few days ago. Steinberg discussed his ''very big deal'' and Kaye offered to ''get you the right people for to, to protection''. Kaye added that the drugs could be gotten in ''100 places'' but that ''I don't want nothing to do with it.'' Steinberg remarked that he was only the middleman and Kaye advised caution in his business transactions (Ex. 2I8; JA 108-14). Kaye never reappeared in the case.

From this evidence the most that could be concluded is that Kaye first stated that he was willing to look for the drugs and then reported his inability to obtain them. That is not a conspiracy. ''Mere willing participation in acts with alleged co-conspirators, knowing in a general way that their intent was to break the law, is insufficient to establish a conspiracy.'' *United States* v. *Falcone*, 109 F.2d 579 (2d Cir.), *aff'd*, 311 U.S. 205 (1940); *United States* v. *Purin*, 486 F.2d 1363, 1369 (2d Cir. 1973), *cert. denied*, 417 U.S. 930 (1974). Kaye expressed a desire to help Steinberg acquire narcotic drugs from an unknown third party. Kaye was never given any money to complete the purchase, nor was it ever shown that he had any access to the drugs sought by Steinberg. Kaye's connection with the alleged transaction was brief and ended abruptly when the defendant alerted Steinberg he wanted nothing further to do with the matter. Kaye did nothing more than casually discuss the proposed purchase of the narcotics sought by Steinberg. By abstaining from the venture, Kaye made it very clear that he had no interest or stake in the outcome of Steinberg's search for drugs. The courts, however, do not sit ''in judgment of an individual's reasons

for abstaining from an agreement to commit a crime. Cianchetti's motives may not have been wholly laudatory, but the fact remains that the evidence shows that he did indeed abstain. He did not cast in his lot with the conspirators, did nothing to further the success of the enterprise, and had no stake in its outcome. His conviction must be reversed." *United States* v. *Cianchetti, supra* at 588.

This case is strikingly similar to the *Cianchetti* case in which heroin suppliers in France, with the aid of a courier, sought to hire Cianchetti to distribute their product in the United States. After displaying part of a theater ticket, as identification, Cianchetti met the courier, confirmed his full knowledge of the conspiracy and expressed reluctance at helping to market the drugs in the United States, because there were dangers involved and because he was the subject of a pending deportation proceeding. Yet, Cianchetti arranged to meet the courier again and left the door open to his possible participation in the scheme. Later, when the courier brought three kilos of heroin for Cianchetti, Cianchetti stated that there was something wrong and that the suppliers knew he was "in hot water". When the courier threatened to find another buyer, Cianchetti told him he might be able to help him out and stated that the courier would probably "hear soon"; Cianchetti did nothing further.

Although Cianchetti had full knowledge of the conspiracy, had met with the courier, had expressed some interest in becoming a participant in the importation scheme, and, indeed, was the intended recipient of the

heroin, this Court concluded that Cianchetti's membership in the conspiracy was never established.

Here, there was no proof to show that Kaye did anything to further the conspirators' purpose. Although the Government argued below (Tr. 465) that Kaye's statement that he had two people calling back who "can do it" (see Ex. 1D4; JA 100), showed that Kaye had actually attempted to locate the drugs, the proof reveals that Kaye did nothing other than speak to Steinberg. Indeed, even if Kaye had found a willing seller of the drugs in California, it is doubtful that the proof would warrant a conspiracy conviction. *United States* v. *Hysohion, supra.* ("The fact that Rimbaud told Everett, a willing buyer, how to make contact with a willing seller, it is not necessarily implied that there was an agreement between that seller, who was Roupinian and Rimbaud.") Also, Kaye's acts never progressed to the point where he had a "stake in the outcome".

Kaye at most said that he would look for the drugs. He was, therefore, no more than "a casual facilitator", which would not support his conviction for conspiracy. The necessary element of an "agreement" to distribute or to possess with intent to distribute drugs is missing. See *United States v. Agueci,* 310 F.2d 817 (2d Cir. 1962), *cert. denied,* 372 U.S. 959 (1963). Thus, this case differs from the recent cases in which this Court has found the existence of a conspiratorial agreement. For example, in *United States* v. *Purin, supra,* where the defendant arranged for the buyer to meet the seller, "extolled" the virtues of the heroin to be sold and tried to have the sale consummated in his store, this Court found him to be a conspirator. Also, in *United States* v. *Masullo,* 489 F.2d

217 (2d Cir. 1973), where the defendant Edelman was a trusted lieutenant of the major figure, prepared for the transaction, carried the bag of drugs, "extolled" the merchandise and was present at the sale, this Court found him to be a conspirator. Each of those factors is missing here. Kaye, for all the evidence shows, did not even try to find a seller, arranged no meetings, and added nothing to the alleged transactions other than frivolous advice—avoid people with machine guns, advice Steinberg did not need.

Too, there can be no question that the conduct of Howard Kaye constituted even less than the "single act" which may be sufficient to make one a co-conspirator. As this Court has noted, the mere purchase [*United States* v. *Aviles*, 274 F.2d 179, 190 (2d Cir.), *cert. denied*, 362 U.S. 974 (1960)], the isolated sale [*United States* v. *Reina*, 242 F.2d 302, 306 (2d Cir.), *cert. denied*, 354 U.S. 913 (1957)], or the delivery of drugs [*United States* v. *DeNoia*, 451 F.2d 979, 981 (2d Cir. 1971)] may be insufficient to prove one's guilt of a drug conspiracy. But see *United States* v. *Torres*, 503 F.2d 1120, 1124 (2d Cir. 1974), in which the conspiracy was of small scope, having four members, and the "single act" included statements by the defendant that he knew of the conspiracy and his own "act" was one in which all the co-conspirators were involved. Indeed, this Court recently reversed a conspiracy conviction as insufficient in a case where a defendant committed a single act far more substantial than anything done by Howard Kaye. In *United States* v. *Tramunti*, slip op. 2107 (2d Cir. March 7, 1975), the Court reversed the conviction of Alonzo who had purchased two ounces of heroin to begin his heroin business "to start off small". Moreover Alonzo had actually been

present when a delivery of drugs had been made. If Alonzo's connection with a large scale conspiracy could not be found from those acts, how can Kaye's conduct be condemned.

Of course, if Kaye did not participate in the conspiracy, he could not have properly been found to be guilty of the substantive "wire" coun.. For the count as charged in the indictment alleged that Kaye and Steinberg used the telephone "in committing and in causing and facilitating the commission of the conspiracy set forth in Count One of this Indictment" (JA 9-10). In sum, it having never been shown that Kaye was a participant in the agreement proved at trial, the defendant's motion to dismiss at the end of the Government's case should have been granted.

POINT II

The single conspiracy alleged in the indictment was not proved, the trial evidence having merely disclosed the existence of a number of distinct conspiracies, revolving around the actions of Stuart Steinberg.

Assuming that this Court concludes that Howard Kaye could be found to have joined in a conspiratorial agreement [but see Point I, *supra*], the judgment cannot stand because of the variance between the indictment, which alleged Kaye's complicity in a single conspiracy, and the trial evidence, which showed no more than a number of distinct criminal agreements.

Since it was not shown that Howard Kaye was a member of all the conspiracies proved at trial, a judgment of acquittal should have been ordered. *Kotteakos* v. *United*

States, 328 U.S. 750 (1946); *United States* v. *LaVecchia*, slip op. 2741 (2d Cir. April 4, 1975); *United States* v. *Miley*, slip op. 2363 (2d Cir. March 19, 1975); *United States* v. *Tramunti*, slip op. 2107 (2d Cir. March 7, 1975); *United States* v. *Sperling*, 506 F.2d 1323 (2d Cir. 1974), *cert. denied*, 43 L.Ed.2d 439 (1975); *United States* v. *Sisca*, 503 F.2d 1337 (2d Cir. 1974), *cert. denied*, 43 L.Ed.2d 283 (1974); *United States* v. *Mallah*, 503 F.2d 971 (2d Cir. 1974), *cert. denied*, 43 L.Ed.2d 671 (1975).

In reviewing single-multiple conspiracy claims in drug cases, this Court has analyzed the nature of the enterprise involved. In the typical "chain" conspiracy, depicting numerous levels, ranging from the importation of drugs, adulteration, packaging and wholesaling, to the eventual retail street sale, the Court has held that the nature and size of such an operation is relevant to the existence of one continuing chain conspiracy in which all of the actors will be held to have been knowing participants.

Since members of this type of operation know "* * * 'that the success of their "independent" venture [adulterating and selling narcotics] was wholly dependent upon the success of the entire "chain" * * * [a]n individual associating himself with a "chain" conspiracy knows that it has a "scope" and that for its success it requires an organization wider than may be disclosed by his personal participation.'" *United States* v. *Agueci*, 310 F.2d 817, 826-7 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963); *United States* v. *Miley*, *supra* at 2388.

Where the proof discloses that the defendants were part of "wheel-spoke" conspiracy, such as where a single

distributor is linked to several independent buyers or sellers of drugs, different problems arise in establishing that the defendants all conspired with one another. The Court has previously indicated that where such an enterprise was shown to exist, "There would be more than one conspiracy unless the evidence of the scale of the operation permitted the inference that the persons at a particular level must have known that others were performing similar roles." *United States* v. *Miley, supra* at 2388-9. Speaking of this type of enterprise, the court, in an opinion predating the commencement of the instant trial, advised the Government that: "While it is obviously impractical and inefficient for the government to try conspiracy cases one defendant at a time, it has become all too common for the government to bring indictments against a dozen or more defendants and endeavor to force as many of them as possible to trial in the same proceeding on the claim of a single conspiracy when the criminal acts could be more reasonably regarded as two or more conspiracies, perhaps with a link at the top." *United States* v. *Sperling, supra* at 1340-1. The *Sperling* warnings which, no doubt, apply to trials commenced after October 1974 [*United States* v. *Miley, supra* at 2389 n. 10], were ignored by the Government below. For the proof here established no more than the typical "wheel-spoke" conspiracy connecting Stuart Steinberg to several other people who, the evidence reasonably showed, were unconcerned, unaware, indifferent and, in large measure, without knowledge of the actions and the roles played by anyone else.

The early conversations in this case show Steinberg's frantic attempts to sell more than $600,000 worth of PCP or cocaine to the undercover officers. He unsuccessfully

tried numerous sources of supply including Stolzenberg, Capo and Durst, and attempted to interest Kaye [but see Point I, *supra*]. While that deal was falling apart for lack of drugs and thereafter, Steinberg was also discussing drug deals with others such as with Parker for hash oil, with Capo for pills and marijuana, with Preisman for 50,000 depressants, with Durst for hashish, with Stephen Effron for ten pounds, and then three pounds of cocaine, and with Susan Weinblatt for pills and hashish.

Unquestionably, the conversations overheard on Steinberg's telephone between Steinberg and the various defendants provided no basis for the jury's conclusion that all the defendants were part of one conspiracy. The picture painted by these conversations shows chaotic activities centering around Steinberg. In *United States* v. *Miley*, this Court overturned a finding that a single conspiracy existed on proof establishing that defendants Brandt and Miley sold undercover agents a various assortment of drugs which Brandt and Miley obtained from three independent drug suppliers. Describing the facts before it as a classic illustration of the "wheel-spoke" conspiracy, the Court ruled that the proof failed to warrant the conclusion that the suppliers and Brandt and Miley had conspired together in the single conspiracy charged in the indictment. The suppliers, of course, were unaware and indifferent to each others' existence, which was precisely the situation here.

Steinberg was a party to conversations with a variety of persons, unrelated to each other, some of whom were sellers and others buyers of drugs; most of them happened to be the defendants in this case. This circumstance

is insufficient to establish a single conspiracy. *United States* v. *Tramunti, supra* at 2136-8. The random conversations overheard on Steinberg's telephone did not show a "loose-knit combination" in which each defendant was aware of the functions performed by the others. *United States* v. *Sperling, supra* at 1340. Also, the venture simply lacked the indicia of a joint partnership previously relied upon by this Court in upholding a single conspiracy finding in analogous cases; thus, the enterprise was far from a "highly structured" and "disciplined" business conducted solely to realize profits from the sale of drugs. *United States* v. *Sisca, supra* at 1345. Steinberg's erratic behavior made such a goal impossible. And, apart from their individual dealings with Steinberg, the parties did not interrelate their own operations or pool their assets and resources. Nor was there any indication that the defendants cooperated with and were mutually dependent upon one another. *United States* v. *Tramunti, supra* at 2136-8; *United States* v. *Sperling, supra* at 1340-43; *United States* v. *Sisca, supra* at 1345; *United States* v. *Malloh, supra* at 983-4; *see also United States* v. *Arroyo,* 494 F.2d 1316, 1319 (2d Cir.), *cert. denied* 95 S.Ct. 46 (1974); *United States* v. *Bynum,* 485 F.2d 490, 495-7 (2d Cir. 1973), *vacated and remanded on other grounds,* 417 U.S. 903 (1974).

Certainly, Howard Kaye was not aware of the numerous narcotics discussions described above, among Steinberg and the other defendants. Most of Steinberg's discussions overheard on his telephone concerned his efforts to purchase and sell items such as hashish oil, marijuana and assorted pills, transactions with which Kaye concededly had no connection. Indeed, most of these conversations oc-

curred after Kaye had informed Steinberg that he wanted nothing further to do with any of Steinberg's drug transactions. Compare *United States* v. *Santana*, 503 F.2d 710, 714 (2d Cir. 1974).

Nor could the failure of proof here have been cured by the trial judge's charge, instructing the jury that each defendant could only be convicted of a single conspiracy (JA 133-4). There was no view of the evidence that could warrant such a finding. *Kotteakos* v. *United States, supra*; *United States* v. *Miley, supra; United States* v. *Borelli*, 336 F.2d 376 (2d Cir. 1960), *cert. denied sub nom. Cinqugrano* v. *United States*, 379 U.S. 960 (1965); *United States* v. *Agueci, supra.*

Of course, a variance between the indictment and the trial evidence does not require a judgment of acquittal unless the variance was such as to "affect the substantial rights of the accused". *Berger* v. *United States*, 295 U.S. 78, 82 (1935); *United States* v. *Miley, supra*, slip op. at 2390; *United States* v. *Agueci, supra* at 827; *see also United States* v. *Calabro*, 467 F.2d 973, 983 (2d Cir. 1972), *cert. denied* 410 U.S. 926 (1973), *reh. denied*, 411 U.S. 941 (1973); *United States* v. *Vega*, 458 F.2d 1234, 1236 (2d Cir. 1972), *cert. denied sub nom. Moore* v. *United States*, 410 U.S. 982 (1973). The existence of prejudice to Howard Kaye cannot here be disputed. The "spill-over" effect from the introduction of "damaging evidence" relating to the others was substantial. *United States* v. *Miley, supra* at 2393. Though Kaye's role, if any, with respect to Steinberg was very limited, the Government offered voluminous evidence showing Steinberg's dealings with the other defendants

with whom Steinberg had separately conspired. Thus, for example, Kaye was overheard on only five of the sixty-eight wiretaps played for the jury. The overwhelming majority of the remaining sixty-three wiretaps related to the conspiracies between Steinberg and others. Ten conversations related to the seconal-tuinol-quaalude* transactions. Similarly, numerous conversations related to the transactions involving sixty pounds of hashish, something with which Howard Kaye had no connection. Also, there were discussions involving Stephen Effron's negotiations with Steinberg concerning large quantities of cocaine, transactions which occurred long after Howard Kaye's participation in any conspiracy ended. Of the four defendants who were tried, there were at least three conspiracies, if any—between Kaye and Steinberg, Parker and Steinberg, and Capo and Steinberg; there were numerous other conspiracies proved between Steinberg and the remaining seven defendants. "The dangers of transference of guilt from one to another across the lines separating conspiracies, subconscious or otherwise, are so great that no one can really say prejudice to substantial right has not taken place." *Kotteakos* v. *United States, supra* at 744; *United States* v. *Miley, supra* at 2393.

Additionally, it was prejudicial for the jury to consider the actual ten ounces of PCP, present in the courtroom, against Kaye. Although, "The rule is clear that one who joins an existing conspiracy takes it as it is, and is therefore accountable for the prior conduct of co-conspirators"

* Of course, at the time of the indictment quaaludes were not a controlled substance and the jury had to be continually instructed that they were not within the scope of the indictment.

[*United States* v. *Sansone*, 231 F.2d 887, 893 (2d Cir.), *cert. denied*, 351 U.S. 987 (1956); *United States* v. *Torres*, *supra* at 1124; compare JA 137] there was no proof that Kaye had anything to do with those drugs. Also prejudicial were a number of conversations between Steinberg and the other defendants containing graphic descriptions of their sexual escapades (Exs. 2D13, 2K7, 2K12, 2L1). Kaye was not a party to any of that conduct. While these conversations were irrelevant to the issues, they were certainly inflammatory and jeopardized Kaye's right to a fair hearing on the question of his complicity in the conspiracy set forth in the indictment.

In sum, the Government's failure to follow the advice given in *Sperling* with respect to the joinder of multiple conspiracies in one trial necessitates reversal with a direction to enter judgment of acquittal.

POINT III

Howard Kaye incorporates by reference all points raised by the other appellants in this appeal, to the extent that those points are relevant to him.

Pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure, Howard Kaye adopts by reference those points raised by the other appellants herein to the extent that they are relevant in deciding this appeal.

Conclusion

The judgment appealed from should be reversed and the indictment dismissed.

Respectfully submitted,

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Service of 2 copies of the within Brief is hereby admitted this 19th day of May 1975

Signed _____

Attorney for Appellee

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